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No. 03-1423

# In the Supreme Court of the United States

DARIN L. MUEHLER AND ROBERT BRILL, PETITIONERS

*v.*

IRIS MENA

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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## QUESTIONS PRESENTED

1. Whether the Fourth Amendment permits police officers, incident to execution of a valid warrant to search a residence for deadly weapons, to seize an occupant with force and detain her in restraints during the search.

2. Whether the Fourth Amendment permits officers, incident to execution of a valid search warrant, to question an otherwise lawfully detained occupant while the search is ongoing.

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

## INTEREST OF THE UNITED STATES

This case presents the issue whether police officers, incident to execution of a valid warrant to search a residence for deadly weapons, may seize an occupant with force and detain her in restraints during the search. It also presents the issue whether officers, consistent with the Fourth Amendment, may question an otherwise lawfully detained occupant while the search is ongoing. The Court's resolution of those issues will have significant implications for the conduct of federal law enforcement officers in executing search warrants. The United States therefore has a substantial interest in the Court's disposition of this case.

## STATEMENT

1. On January 13, 1998, petitioners, two officers assigned to the gang unit of the Simi Valley, California, police department, were dispatched to investigate a drive-by shooting. Petitioners later linked the shooting to a previous shooting involving two rival gangs, the West Side Locos gang and the Varrio Simi Valley gang. They determined that Raymond Romero, a member of the West Side Locos gang, was a primary suspect in both shootings, and that he likely possessed a gun used in the shootings. J.A. 43-44, 211-222; Pet. App. 56a.

After learning that Romero was living at 1363 Patricia Avenue in Simi Valley, petitioners sought and obtained a search warrant for that address. The warrant authorized police to search the house, the surrounding grounds, and any nearby vehicles belonging to the residents. Located on the surrounding grounds were a motorhome, a camper, a shed, a van, a boat, and two trucks. Among other things, police were authorized to search for deadly weapons, evidence of gang membership, items of identification, and any other stolen property. J.A. 205-211, 245; Pet. App. 57a-58a.

Around 7 a.m. on February 3, 1998, a team of officers, overseen by petitioners, executed the search warrant. Because the officers were investigating a violent crime, believed that gang members were living in the house, and had encountered resistance on previous visits to investigate violent crimes there, they decided to use a Special Weapons and Tactics (SWAT) team to secure the house. The SWAT team broke down the front door and entered. One or two members of the SWAT team entered a bedroom and found respondent, an 18-year-old woman, apparently asleep. The officers roused her at gunpoint, turned her face down, and handcuffed her.



J.A. 44-51, 54, 61, 78-80, 94-95, 173-174; Pet. App. 58a-59a.

Respondent and three other occupants of the house were brought to the garage, which had been converted into a bedroom. The police then began to search the house. The four occupants were held in the room in handcuffs during the search, which, according to respondent, lasted approximately two to three hours. For most of the search, one or two officers guarded the occupants. Respondent initially sat on one of the beds in the room, then moved to another bed. She was wearing a long-sleeved shirt and sweatpants, and later was given a jacket and shoes. At one point, she asked why she had been handcuffed, and requested that her handcuffs be removed; she did not complain, however, that the handcuffs were too tight. J.A. 83, 90, 105, 106, 108, 136-137, 139, 191-192; Pet. App. 29a, 59a.

Because the West Side Locos gang was predominantly composed of illegal immigrants, police had asked an agent from the Immigration and Naturalization Service (INS) to be present at the scene. While the search was ongoing, a police officer asked respondent, a legal alien, for her name, date of birth, and immigration status. The officer, in turn, summoned the INS agent, who came into the room, identified himself, and asked respondent for her immigration papers. When respondent said that her papers were in her purse, a police officer retrieved the purse, removed the papers, and gave them to the INS agent. At the end of the search, respondent was brought into the living room, released from her handcuffs, and told why she had been detained. During the search, police found a gun; bullets of the caliber used in one of the shootings; newspaper articles about the shootings; two baseball bats with

gang markings; and a small bag of marijuana. J.A. 82, 106-107, 122, 138-139, 159-160; Pet. App. 25a-26a.

2. Respondent brought suit against petitioners under 42 U.S.C. 1983, alleging, *inter alia*, that petitioners had violated her Fourth Amendment rights by searching the entire house and by detaining her for an unreasonable time and in an unreasonable manner. J.A. 16-25.[1] Petitioners moved for summary judgment, arguing both that they had not violated respondent's constitutional rights and that they were entitled to qualified immunity for any constitutional violation that had occurred. Pet. App. 59a-60a. The district court denied petitioners' motion, and the court of appeals affirmed in relevant part. *Id.* at 55a-72a.

The court of appeals first held that a triable issue existed as to whether the search of the house was overbroad because the officers should have realized that the house contained multiple residences. Pet. App. 64a-66a. Regarding respondent's detention, the court reasoned that, "if the jury here should conclude that the officers did have probable cause to search the entire premises * * * then the lawful authority to detain [respondent] would continue—and a reasonable officer could so conclude on these facts." *Id.* at 70a. On the other hand, "if the jury should conclude that the officers did not have probable cause to search [the entire house], then [respondent's] detention rests on a different footing and may be justified only in connection

[1] Respondent and her father, the owner of the house, also brought suit on a variety of claims against the City of Simi Valley and 16 other police officers, and on other claims against petitioners. J.A. 16-25. The lower courts dismissed or rejected all of those claims.



with whatever search the jury concludes to have been 'proper.'" *Ibid.*

3. At trial, a jury rejected the claim that the search of the entire house was overbroad because the officers should have realized that the house contained multiple residences. Pet. App. 50a. The jury found, however, that petitioners violated respondent's Fourth Amendment rights by "detaining her with force greater than that which was reasonable under the circumstances" and by "detaining her for a longer period than reasonable." *Id.* at 51a. The jury awarded $10,000 in general damages and $20,000 in punitive damages, plus attorney's fees, against each petitioner. *Id.* at 51a-53a. Petitioners filed post-trial motions contending, *inter alia*, (i) that, in the wake of this Court's intervening decision in *Saucier* v. *Katz*, 533 U.S. 194 (2001), the district court had erroneously conflated the two steps of the qualified-immunity analysis, and (ii) that the court had incorrectly instructed the jury on the unlawful-detention claim. The district court denied petitioners' motions. Pet. App. 35a-47a.

4. The court of appeals affirmed. Pet. App. 1a-22a.

a. As relevant here, the court of appeals first held that the officers violated respondent's Fourth Amendment rights. Pet. App. 6a-14a. Although the court acknowledged that the officers were investigating a serious crime, *id.* at 8a, it concluded that, "[b]y any standard of reasonableness, in light of the fact that [respondent] was not a suspect in the crime, the officers should have released her from the handcuffs when it became clear that she posed no immediate threat and did not resist arrest," *id.* at 9a. The court added that, "because [respondent] was not a suspect, the police should not have subjected her to any of the heightened security measures police officers employ while de-

taining persons suspected of being violent criminals." *Ibid.* Although the court recognized that police officers are often required to make split-second decisions in executing warrants, the court concluded that "it strains reason to justify the necessity—in these factual circumstances—of pointing a machine gun at [respondent's] face, roughly jerking her off of her bed, marching her barefoot through the rain into a cold garage, and keeping her in handcuffs for several hours." *Id.* at 10a.

The court of appeals alternatively held that the officers had "unduly invaded [respondent's] privacy" by inquiring about her immigration status. Pet. App. 10a. "On these facts alone," the court continued, "[respondent] has alleged a violation of a constitutional right." *Ibid.* Relying on this Court's decision in *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975), the court reasoned that the officers lacked particularized reasonable suspicion to justify questioning respondent about her immigration status or searching for her immigration papers. Pet. App. 14a. The court concluded that, "[a]lthough the officers did not confront [respondent] in the context of a traffic stop, as the officers did in *Brignoni-Ponce*, the facts of this case sit within the ambit of the Supreme Court's decision in that case." *Ibid.*

b. Finally, the court of appeals held that petitioners were not entitled to qualified immunity because, in its view, the rights in question were clearly established. Pet. App. 14a-15a.

5. The court of appeals denied petitioners' petition for rehearing and suggestion for rehearing en banc. Pet. App. 23a-34a.

a. Judge Kleinfeld, joined by five other judges, dissented from the denial of rehearing en banc. Pet.



App. 25a-32a. Judge Kleinfeld stated that "[t]he panel creates the extraordinary new proposition of law that it is unconstitutional to ask a person detained for other reasons about her citizenship, without reasonable suspicion." *Id.* at 26a. He distinguished *Brignoni-Ponce* on the ground that "[t]he gravamen of the interference with individual liberty [in *Brignoni-Ponce*] was the stop, not the questioning." *Id.* at 28a. As for the detention, Judge Kleinfeld reasoned that the panel's decision was inconsistent with this Court's decision in *Michigan* v. *Summers*, 452 U.S. 692 (1981), which held that a warrant to search for contraband carried with it the authority to detain occupants during the search except in an "unusual case." Pet. App. 29a-32a. If this case qualified as "unusual," he contended, "the holding of *Summers* is deprived of any force." *Id.* at 32a.

b. Judge Gould, joined by two other judges, also dissented. Pet. App. 33a-34a. He would have held that "a question is not a seizure." *Id.* at 33a. Even if the questioning implicated the Fourth Amendment, however, Judge Gould asserted that the officers had a reasonable basis to ask respondent about her citizenship, since she was found in a house occupied by members of a gang known to be composed largely of illegal immigrants. *Ibid.* Regarding the detention, Judge Gould reasoned that "we should not say that the Constitution precludes ensuring that any person found in potential proximity to weapons is restrained from finding and using a gun on the police." *Ibid.* "Law enforcement must confront certain unavoidable dangers," he concluded, "but the Constitution does not require that they face avoidable ones." *Ibid.* (footnote omitted).

## SUMMARY OF ARGUMENT

Respondent's detention incident to the execution of a valid search warrant, and the questioning that occurred during that detention, were reasonable under the Fourth Amendment.

I. In *Michigan* v. *Summers*, 452 U.S. 692 (1981), this Court held that officers executing a warrant to search for contraband may detain the occupants of the premises while the search is conducted. That rule is supported by compelling law enforcement interests: the interest in preventing flight in the event that incriminating evidence is found; the interest in protecting officer safety and preventing the destruction of evidence; and the interest in facilitating the orderly completion of the search. Although the Court suggested that a detention pursuant to *Summers* could be invalid in unusual cases involving special circumstances or a prolonged detention, neither the duration nor the manner of the detention here raises any constitutional difficulty. The duration of respondent's detention was reasonable, especially given the breadth of the search warrant being executed. Moreover, because the execution of a warrant to search for deadly weapons that had been used in gang-related drive-by shootings presented an unusually high degree of risk, the officers were justified in detaining respondent at gunpoint, and restraining her in handcuffs, for the duration of the search.

II. The fact that officers briefly questioned respondent during her detention does not raise Fourth Amendment concerns. This Court has repeatedly held that mere police questioning does not constitute a seizure. The court of appeals therefore erred by holding that an officer must have an independent justification,



in the form of reasonable suspicion, before questioning an individual who has been lawfully detained. Such a requirement would radically reshape this Court's Fourth Amendment jurisprudence. Instead, where an officer is detaining an individual incident to the execution of a search warrant, and where the questioning does not prolong the detention, no Fourth Amendment violation occurs. In this case, it is clear that the officers' questioning of respondent did not prolong her detention. Accordingly, the questioning and detention of respondent were consistent with the Fourth Amendment.

## ARGUMENT

### I. RESPONDENT'S DETENTION INCIDENT TO THE EXECUTION OF A SEARCH WARRANT WAS VALID UNDER THE FOURTH AMENDMENT

The Fourth Amendment to the Constitution guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. Amend. IV. "[A] person has been 'seized' within the meaning of the Fourth Amendment," in turn, "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *California* v. *Hodari D.*, 499 U.S. 621, 627-628 (1991) (quoting *United States* v. *Mendenhall*, 446 U.S. 544, 554 (1980) (opinion of Stewart, J.)). Because respondent's seizure was reasonable, it did not violate the Fourth Amendment.

### A. Under *Michigan* v. *Summers*, Police Officers May Detain The Occupant Of A Residence, Incident To The Execution Of A Valid Warrant To Search The Residence For Contraband, Except In "Unusual Cases"

1. In *Michigan* v. *Summers*, 452 U.S. 692 (1981), police officers encountered an individual leaving a house as they were preparing to execute a warrant to search the house for narcotics, and detained him inside for the duration of the search. The Court upheld the detention. *Id.* at 705. At the outset, the Court reiterated the "general rule" that the seizure of a person ordinarily must be supported by probable cause. *Id.* at 696. The Court recognized, however, that "some seizures admittedly covered by the Fourth Amendment constitute such limited intrusions on the personal security of those detained and are justified by such substantial law enforcement interests that they may be made on less than probable cause." *Id.* at 699.

The Court then weighed "the character of the official intrusion and its justification" in the case of a detention incident to execution of a warrant to search for contraband. 452 U.S. at 701. Concerning the intrusion, the Court noted that the officers' acquisition of the warrant was "[o]f prime importance." *Ibid.* The Court observed that "[a] neutral and detached magistrate had found probable cause to believe that the law was being violated in that house and had authorized a substantial invasion of the privacy of the persons who resided there." *Ibid.* Therefore, "[t]he detention of one of the residents while the premises were searched, although admittedly a significant restraint on his liberty, was surely less intrusive than the search itself." *Ibid.* And because the information being sought by the officers



would normally be obtained through the search, rather than through detention incident to the search, the Court stated that such detention "is not likely to be exploited by the officer or unduly prolonged in order to gain more information." *Ibid.* Finally, the Court noted that, because the detention would occur inside the home, "it could add only minimally to the public stigma associated with the search itself and would involve neither the inconvenience nor the indignity associated with a compelled visit to the police station." *Id.* at 702.

Having concluded that the intrusion resulting from a detention was slight, the Court proceeded to find that the justifications for a detention were substantial. 452 U.S. at 702-703. "Most obvious," the Court noted, "is the legitimate law enforcement interest in preventing flight in the event that incriminating evidence is found." *Id.* at 702. "Less obvious, but sometimes of greater importance," the Court added, "is the interest in minimizing the risk of harm to the officers." *Ibid.* The Court observed that "the execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence." *Ibid.* Therefore, "[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." *Id.* at 702-703. In addition, "the orderly completion of the search may be facilitated if the occupants of the premises are present," since the occupants could assist the police by opening locked doors or containers. *Id.* at 703.

The Court also considered the role of the search warrant in "provid[ing] an objective justification for the detention." 452 U.S. at 703. The Court reasoned that, when a search warrant for contraband has been issued, "[a] judicial officer has determined that police have

probable cause to believe that someone in the home is committing a crime." *Ibid.* Thus, "[t]he connection of an occupant to that home gives the police officer an easily identifiable and certain basis for determining that suspicion of criminal activity justifies a detention of that occupant." *Id.* at 703-704.

Accordingly, this Court held in *Summers* that "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." 452 U.S. at 705 (footnote omitted). In a footnote, the Court stressed that "[t]he rule we adopt today does not depend upon * * * an ad hoc determination, because the officer is not required to evaluate either the quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure." *Id.* at 705 n.19. In another footnote, however, the Court acknowledged that "special circumstances, or possibly a prolonged detention, might lead to a different conclusion in an unusual case." *Id.* at 705 n.21.

2. In the nearly quarter century since this Court's decision in *Summers*, the *Summers* rule has proven to be both prudent and workable. Professor LaFave has described *Summers* as the "most significant" of the cases in which this Court has "opted for a standardized procedure to avoid the necessity of case-by-case decisionmaking by police and courts," and has concluded that the rule of *Summers* "makes eminently good sense." 2 Wayne R. LaFave, *Search and Seizure* § 4.9(e) at 649, 651-652 (3d ed. 1996). And this Court has frequently relied on *Summers* in later Fourth Amendment decisions, without elaborating on, or even mentioning, *Summers*' footnote discussing the possibility of "unusual cases." See, *e.g.*, *Illinois* v. *McArthur*, 531 U.S. 326, 331 (2001); *Wilson* v. *Layne*, 526 U.S. 603, 611 (1999); *United States* v. *Place*, 462 U.S. 696, 703, 704 (1983).



### B. Respondent's Detention Pursuant To *Summers* Was Valid

1. The officers' actions in this case fall squarely within the logic and holding of *Summers*. The officers were executing a warrant to search for "[d]eadly weapons, specifically firearms including ammunition, * * * knives * * * and evidence of street gang membership." J.A. 210. The warrant was obtained as part of an investigation of a gang-related drive-by shooting, and the prime suspect was thought to live at the location to be searched. J.A. 43-44, 211-222; Pet. App. 56a. The potential for an outbreak of violence was significant enough for the officers to engage a SWAT team to execute the warrant. J.A. 50-51, 54, 61, 78-80, 173-174. Under those circumstances, *Summers* authorized a detention of all occupants of the dwelling to be searched in order to ensure the safety of the officers and all persons in the residence. "The connection of an occupant to that home gives the police officer an easily identifiable and certain basis for determining that suspicion of criminal activity justifies a detention of that occupant." *Summers*, 452 U.S. at 704. The fact that the officers had no specific reason to regard respondent as a suspect is irrelevant: the *Summers* rule "does not depend upon such an ad hoc determination, because the officer is not required to evaluate either the quantum of proof justifying the detention or the extent of the intrusion to be imposed by the seizure." *Id.* at 705 n.19.

Respondent's detention does not remotely present the type of "special circumstances" or "prolonged de-

tention," *Summers*, 452 U.S. at 705 n.21, that might take this case outside the *Summers* rule that a detention incident to the execution of a warrant to search for contraband is valid. Both the duration and the manner of the detention were reasonable. The duration of respondent's detention was not excessive—especially when measured against the breadth of the search warrant, which authorized the officers to search not only the house, but also the surrounding grounds and nearby vehicles, for a variety of items. J.A. 205-211. Nothing in the record suggests that the officers failed to carry out the search expeditiously. Likewise, the manner of the detention was resonable. Although respondent was detained in handcuffs for the duration of the search, respondent did not complain that her handcuffs were too tight. J.A. 105, 139. Respondent was able to move around the room during the detention. J.A. 108, 136-137. And respondent was fully dressed at the time of the initial seizure, and was provided with additional clothing during the course of the detention. J.A. 106; Pet. App. 29a.

2. In concluding that the officers' conduct violated the Fourth Amendment, the court of appeals relied primarily on two facts: (i) that respondent was seized at gunpoint, and (ii) that respondent was held in handcuffs for the duration of the search. Pet. App. 9a. In emphasizing these two facts, however, the court of appeals did not cite this Court's decision in *Summers*, but instead evaluated respondent's claim under the more general "objective reasonableness" standard applicable to excessive-force claims. *Id.* at 6a-14a; see *Graham* v. *Connor*, 490 U.S. 386, 397 (1989).[2]

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[2] In *Graham*, the Court held that "*all* claims that law enforcement officers have used excessive force * * * in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." 490 U.S. at 395.



The use of force, by itself, to effectuate a *Summers* detention does not trigger constitutional concern. *Summers* expressly authorizes officers to *detain* an occupant of the place to be searched, and that authorization necessarily entails the ability to use force to do so. Cf. *Graham*, 490 U.S. at 396 (noting that "the right to make an arrest or investigative stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it"). Officers are not required to rely on an occupant's good faith or passive acquiescence in a direction to remain on the premises. Indeed, one of the justifications for a *Summers* detention is to avoid the risk that an occupant will flee if the search reveals evidence linking the occupant to criminal activity. 452 U.S. at 702. Nor are police officers required to take the chance that an apparently harmless suspect can safely be left unrestrained. Rather, "[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." *Id.* at 702-703. Thus, the actions of the court of appeals emphasized—the drawing of guns and the use of restraints—cannot constitute "special circumstances" under *Summers* or amount to "excessive force" under *Graham*.[3]

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[3] This Court has not clarified the relationship between the "special circumstances" mentioned in *Summers* and the test for excessive force later announced in *Graham*. The clearest analytical approach would be to use *Summers* to evaluate the claim that, in light of unusual circumstances, *any* detention of a particular occupant of a dwelling to be searched was impermissible. The *Graham* test, in contrast, would bear on whether the *manner* of an otherwise permissible detention during execution of a warrant involves

When the occupant of a house searched pursuant to a valid warrant claims that the manner of her detention violated the Fourth Amendment because officers used excessive force, the analysis must take into account the law enforcement exigencies in executing a search warrant and the Court's admonition in *Summers* that officers are not required to make ad hoc, case-specific determinations about the degree of risk that a particular individual may pose. Because the facts on which the court of appeals relied do not render the officers' conduct here objectively unreasonable, the court of appeals erred by concluding that the manner of respondent's detention was invalid.

a. The court of appeals first asserted that the officers should not have seized respondent at gunpoint. Pet. App. 9a. The officers' decision to do so in this case, however, was entirely reasonable. Because the officers were investigating a violent crime, believed that gang members were living at the house, and had encountered resistance on previous visits to investigate violent crimes there, the officers concluded that execution of the search warrant involved an unusually high degree of risk, and therefore decided to employ a SWAT team. J.A. 50-51, 54, 61, 78-80, 173-174. The SWAT team's decision to seize respondent at gunpoint—and its decision initially to restrain her—constitutes precisely the type of judgment, "in circumstances that are tense, uncertain, and rapidly evolving," *Graham*, 490 U.S. at

excessive force. Under that dichotomy, it would appear that respondent challenges the *manner* of her detention, not whether she could be detained at all. But regardless of which test is applied, the holding of this Court in *Summers* that officers should generally be able to detain occupants of a house should inform the reasonableness analysis.



397, to which this Court has traditionally afforded deference.[4]

b. The court of appeals did not suggest that the officers' decision *initially* to detain respondent in handcuffs was unreasonable, but instead asserted that the officers should have *released* respondent from her handcuffs at some point before the conclusion of the search. Pet. App. 9a. That claim is likewise unfounded.

In virtually all cases, the *Summers* test, together with the justifications that underlie it, supports routine measures by officers to reduce the risks posed by unknown persons detained during a search: most notably, the risk that occupants will endanger the safety of officers if they are left unrestrained. Accomplishing that aim will often require physical restraints. Officers should not be required during the execution of a search warrant to divert resources from the task at hand in order to make a difficult predictive judgment about whether a particular occupant can be released from restraints. Accordingly, lower courts have routinely upheld the use of handcuffs in *Summers* detentions.[5]

[4] The court of appeals also suggested that the officers acted improperly in "roughly jerking [respondent] off of her bed" and "marching her barefoot through the rain into a cold garage." Pet. App. 10a. The officers, however, appear to have used only a minimal degree of force in moving respondent from her bed to the converted garage, J.A. 102, and the distance from the back door of the house to the converted garage (which was attached to the house) was not great, J.A. 103, 244-245.

[5] See, *e.g.*, *Torres* v. *United States*, 200 F.3d 179, 186-187 (3d Cir. 1999); *United States* v. *Fullwood*, 86 F.3d 27, 29-30 (2d Cir.), cert. denied, 519 U.S. 985 (1996); *United States* v. *Fountain*, 2 F.3d 656, 663-664 (6th Cir.), cert. denied, 510 U.S. 1014 (1993); *United States* v. *Guadarrama*, 128 F. Supp. 2d 1202, 1217-1219 (E.D. Wis. 2001); *Turner* v. *Sheriff of Marion County*, 94 F. Supp. 2d 966, 974 (S.D. Ind. 2000); *Crosby* v. *Hare*, 932 F. Supp. 490, 493 (W.D.N.Y.

Even if officers were to conclude, after a colloquy with the detained occupant, that the occupant would likely pose no threat to the safety of officers and would likely not interfere with the conduct of the search if released from handcuffs, officers could never be certain of that conclusion—especially given the very real possibility that an individual who appears to act in a compliant manner when handcuffed could react in a violent manner when freed. Officers would therefore be confronted with an unappealing choice: either to divert additional resources from the search for the purpose of supervising any uncuffed occupants, or to remove any uncuffed occupants from the house altogether, thereby reducing the risk that uncuffed occupants will endanger officers or destroy evidence but increasing the intrusiveness of (and undermining the justifications for) the detention in the first place. See *Summers*, 452 U.S. at 702, 703.

In light of the high-risk nature of any search for narcotics or weapons, see *Summers*, 452 U.S. at 702, and the particularly high-risk nature of this search, the officers' decision to detain respondent and the other occupants of the house in handcuffs for the duration of the search, in order to "exercise unquestioned command

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1996); *Howard* v. *Schoberle*, 907 F. Supp. 671, 677 (S.D.N.Y. 1995); *People* v. *Ornelas*, 937 P.2d 867, 870-871 (Colo. Ct. App. 1996); *Wilson* v. *State*, 547 So. 2d 215, 216-217 (Fla. Dist. Ct. App. 1989); *State* v. *Slater*, 994 P.2d 625, 632 (Idaho Ct. App. 1999); *Martin* v. *City of New Iberia*, 717 So. 2d 1153, 1153 (La. 1998); *People* v. *Zuccarini*, 431 N.W.2d 446, 448 (Mich. Ct. App. 1988); *State* v. *Schultz*, 491 N.E.2d 735, 737, 740 (Ohio Ct. App. 1985); *State* v. *Apalakis*, 797 A.2d 440, 445-446 (R.I. 2002); *State* v. *Banks*, 720 P.2d 1380, 1383 (Utah 1986); *State* v. *Vorburger*, 648 N.W.2d 829, 843-844 (Wis. 2002).



of the situation," *id.* at 703, was objectively reasonable, and therefore did not violate the Fourth Amendment.

3. The courts of appeals that have addressed the question have regularly upheld detentions incident to valid search warrants in cases with facts similar to the circumstances here. For example, in *Torres* v. *United States*, 200 F.3d 179 (3d Cir. 1999), federal agents executing a warrant to search for narcotics broke down the front door of a house, seized one of the occupants at gunpoint, and ordered him to lie on the floor, where they handcuffed him. *Id.* at 182. The occupant, dressed only in a towel, was placed on a couch in the living room and remained there in handcuffs for the duration of the search, which lasted between one and a half and three hours. *Ibid.* The Third Circuit held that the officers' conduct was lawful. *Id.* at 187.

Similarly, in *United States* v. *Fountain*, 2 F.3d 656 (6th Cir.), cert. denied, 510 U.S. 1014 (1993), federal officers executed a search warrant for firearms and narcotics at a house from which firearms and narcotics had previously been seized. *Id.* at 659. Upon entering the house, the agents conducted a protective sweep and brought the four occupants into the living room. *Ibid.* There, the agents ordered the four occupants to lie down on the floor, and frisked and handcuffed them. *Id.* at 659-660. The occupants remained handcuffed on the floor, face down, for up to 30 to 60 minutes while the search was completed. *Id.* at 660, 663. The Sixth Circuit upheld the detention. *Id.* at 663-664.

This case bears no resemblance to the rare instances in which courts of appeals have perceived constitutional problems in *Summers* detentions, finding that a detention was "unnecessarily painful, degrading, or prolonged," or "involve[d] an undue invasion of privacy." *Franklin* v. *Foxworth*, 31 F.3d 873, 876 (9th Cir. 1994).

In *Franklin*, officers seized a bedridden occupant who was suffering from advanced multiple sclerosis. *Id.* at 874. The officers handcuffed him, carried him into the living room, and placed him on a couch. *Id.* at 875. The occupant was exposed from the waist down, and officers left him handcuffed for more than two hours. *Ibid.* The Ninth Circuit held that the detention was constitutionally invalid, and it remanded for a determination of whether the officers were entitled to qualified immunity. *Id.* at 878. The court reasoned that it was "not only the length of the detention but also the treatment afforded the detainee during the detention that offends constitutional principles." *Id.* at 877. It was undisputed that the officers were aware that the occupant could not walk or sit up unassisted. *Ibid.* It would therefore have been "apparent to a reasonable officer" that the occupant posed no serious threat to the officers or to the conduct of the search. *Ibid.* In addition, the officers failed to provide the occupant with clothing or covering before he was carried into the living room, with the result that "his genitals [were] exposed to the view of 23 armed strangers." *Ibid.* The court concluded that the detention "wantonly and callously subjected an obviously ill and incapacitated person to entirely unnecessary and unjustifiable degradation and suffering." *Id.* at 878.

In *Heitschmidt* v. *City of Houston*, 161 F.3d 834 (5th Cir. 1998), officers were executing a warrant to search for evidence of a prostitution ring. *Id.* at 835. Officers lured an occupant out of the house, pushed him against the trunk of a police car, and handcuffed him. *Ibid.* Officers then took the occupant back into the house and positioned him on a bar stool in the living room, where he remained for about four and a half hours while the house was being searched. *Id.* at 835-836. Although the



occupant complained that the handcuffs were painfully tight, his requests that they be loosened were denied. *Id.* at 836. The occupant's request to use the bathroom was also denied. *Ibid.* The Fifth Circuit reasoned that the nature and duration of the occupant's detention, as alleged, were unduly intrusive. *Id.* at 838.[6] The court concluded, on the basis of the pleadings, that the occupant had stated a claim not only that the detention was unlawful, but that the officers were not entitled to qualified immunity. *Id.* at 839.

This case falls at the other end of the spectrum. Respondent was not manifestly ill or injured. Her privacy was not unduly invaded beyond what was reasonably necessary to execute the warrant; instead, the officers furnished her with additional clothing and shoes. Respondent never complained of being in pain or acute discomfort. And the duration of the search was unexceptional. On those facts, it would seriously erode the clarity of the objective *Summers* rule to hold

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[6] The Fifth Circuit also observed that the warrant at issue authorized the officers to search only for evidence and not for contraband. 161 F.3d at 839; see *Leveto* v. *Lapina*, 258 F.3d 156, 168-172 (3d Cir. 2001) (noting that search warrant sought only evidence of tax evasion, but ultimately holding, under *Summers*, that an eight-hour detention was unduly prolonged). In *Summers*, the Court left open whether its holding would apply in a case in which "the search warrant merely authorized a search for evidence." 452 U.S. at 705 n.20. Respondent does not contend that the weapons for which the officers were searching constituted mere "evidence"—nor could she, in light of this Court's repeated assertions in the Fourth Amendment context that weapons are either a form of contraband, see, *e.g.*, *Michigan* v. *Long*, 463 U.S. 1032, 1050 (1983), or of a piece with contraband, see, *e.g.*, *Payton* v. *New York*, 445 U.S. 573, 587-588 (1980).

that the officers violated respondent's constitutional rights.[7]

[7] Although the court of appeals held that petitioners lacked qualified immunity on respondent's constitutional claims, the questions presented in this Court explicitly are addressed to the substantive issue of whether petitioners' conduct violated respondent's constitutional rights. Pet. i. To the extent that the court of appeals' broader holding concerning qualified immunity is subsumed in those questions, see Pet. 13 n.3, 18-19 (challenging the court of appeals' denial of qualified immunity), the court of appeals further erred by holding that the right to be free from detentions of the type to which respondent was subject was clearly established at the time of the alleged violation. See *Saucier* v. *Katz*, 533 U.S. 194, 201 (2001). Although *Graham* and *Summers* had been decided at the time of petitioners' conduct, "the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987). Of the lower-court decisions discussed above, only *Franklin* and *Fountain* had been decided at the time of petitioners' conduct. Because petitioners' conduct was not nearly as egregious as that in *Franklin*, and because the search in *Fountain* was upheld, it cannot be said that the right to be free from the conduct at issue was "clearly established" at the time. This case does not involve the kind of exceptional conduct that can give rise to a damages action despite novel factual circumstances. Cf. *Hope* v. *Pelzer*, 536 U.S. 730, 741 (2002). Indeed, in subsequent cases involving more egregious conduct than this one, courts of appeals have held that, although the conduct is itself unlawful, the officers who engaged in it have qualified immunity. See, *e.g.*, *Williams* v. *Kaufman County*, 352 F.3d 994, 1011-1012 (5th Cir. 2003); *Leveto*, 258 F.3d at 172-174.



## II. THE OFFICERS' QUESTIONING OF RESPONDENT DID NOT RENDER HER DETENTION INCIDENT TO THE EXECUTION OF A SEARCH WARRANT INVALID UNDER THE FOURTH AMENDMENT

In the alternative, the court of appeals held that the officers violated respondent's Fourth Amendment rights because they lacked reasonable suspicion to question respondent about her immigration status. Pet. App. 10a, 14a. That holding was erroneous. Because that questioning did not constitute a discrete seizure and did not render respondent's actual seizure unreasonable, no Fourth Amendment violation occurred.

### A. Questioning Does Not Constitute A Discrete "Seizure" For Fourth Amendment Purposes

The court of appeals' holding was premised on the assumption that the officers were required to have reasonable suspicion in order to question respondent concerning her immigration status—which, in turn, was premised on the further assumption that questioning constitutes a discrete Fourth Amendment event. Both assumptions were mistaken.

1. This Court has "held repeatedly that mere police questioning does not constitute a seizure." *Florida* v. *Bostick*, 501 U.S. 429, 434 (1991); see *Hiibel* v. *Sixth Judicial Dist. Court of Nev.*, 124 S. Ct. 2451, 2458 (2004); *Illinois* v. *Lidster*, 124 S. Ct. 885, 890 (2004); *United States* v. *Drayton*, 536 U.S. 194, 200-201 (2002); *Florida* v. *Rodriguez*, 469 U.S. 1, 5-6 (1984) (per curiam); *INS* v. *Delgado*, 466 U.S. 210, 216-217 (1984); *Florida* v. *Royer*, 460 U.S. 491, 497-498 (1983) (plurality opinion); *id.* at 523 n.3 (Rehnquist, J., dissenting); cf. *Mendenhall*, 446 U.S. at 551-557 (opinion of Stewart, J.). Where an officer simply "approaches an individual

and asks a few questions," *Bostick*, 501 U.S. at 434, the Court has consistently concluded that such contact constitutes "the sort of consensual encounter that implicates no Fourth Amendment interest," *Rodriguez*, 469 U.S. at 5-6. As long as the individual being questioned remains "free to disregard the questions and walk away," an officer may question the individual even absent reasonable suspicion. *Mendenhall*, 446 U.S. at 554 (opinion of Stewart, J.).[8]

2. Respondent obviously was not free to walk away. But because questioning does not constitute a discrete Fourth Amendment event, it follows that an officer need not have an independent justification, in the form of reasonable suspicion, before questioning an individual who has been lawfully detained. In reaching the contrary conclusion, the court of appeals relied primarily on this Court's decision in *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975). That reliance was misplaced. In *Brignoni-Ponce*, the Court considered only whether the Border Patrol had the "authority to *stop* automobiles in areas near the Mexican border," so that officers could question the occupants about their immigration status. *Id.* at 874 (emphasis added). The Court ultimately held that stops by roving patrols near the border "may be justified on facts that do not amount to the probable cause required for an arrest."

[8] Although this Court's decisions in cases such as *Hiibel*, *Bostick*, *Rodriguez*, *Delgado*, and *Royer* hold only that questioning, by itself, cannot constitute a Fourth Amendment "seizure," their reasoning equally compels the conclusion that questioning cannot constitute a Fourth Amendment "search." A "search" occurs when "an expectation of privacy that society is prepared to consider reasonable is infringed." *United States* v. *Jacobsen*, 466 U.S. 109, 112 (1984). No invasion of privacy occurs when an officer asks a question that an individual is under no obligation to answer.



*Id.* at 880. The Court in no way suggested that reasonable suspicion was independently necessary for the questioning that followed the initial stop, as opposed to the stop itself. Indeed, the Court has made clear that, when a stop is justified without individualized suspicion, at a fixed immigration checkpoint, individualized suspicion is not independently required in order for the authorities to ask questions of the persons so seized. *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 562 (1976). As Judge Kleinfeld noted in his opinion dissenting from the denial of rehearing, therefore, "[t]he gravamen of the interference with individual liberty [in *Brignoni-Ponce*] was the stop, not the questioning." Pet. App. 28a.[9]

3. If taken to its logical conclusion, the court of appeals' apparent holding that questioning constitutes a discrete Fourth Amendment event necessitating an independent justification would require courts to engage in excessive "second-guessing" and "*post hoc* evaluation of police conduct," *United States* v. *Sharpe*, 470 U.S. 675, 686 (1985), in order to determine whether any given line of questioning in an interrogation was sufficiently justified. A difficult and refined inquiry to determine whether each particular question was sufficiently related to the initial justification for a stop is not needed to satisfy the Fourth Amendment's objective reasonableness requirement. It would also inject Fourth Amendment standards designed for discrete

[9] The court of appeals also relied on its earlier decision in *United States* v. *Montero-Camargo*, 208 F.3d 1122 (9th Cir.) (en banc), cert. denied, 531 U.S. 889 (2000). Pet. App. 11a-12a. As in *Brignoni-Ponce*, however, the court in *Montero-Camargo* considered only whether Border Patrol agents had "reasonable suspicion to *stop*" two cars near a border checkpoint. 208 F.3d at 1126 (emphasis added).

purposes into the evaluation of custodial interrogation, instead of leaving review of such questioning to the Due Process Clause's voluntariness standard, the Fifth Amendment's Self-Incrimination Clause, or in some cases, the Sixth Amendment. See, *e.g.*, *Fellers* v. *United States*, 124 S. Ct. 1019, 1022-1023 (2004); *Dickerson* v. *United States*, 530 U.S. 428 (2000). And even if the court of appeals' holding could somehow be confined to the immigration context, as the court of appeals may have intended (see Pet. App. 10a-15a), it would hamper the ability of government officials to elicit voluntary responses from individuals about their immigration status.[10] Thus, a rule that questions

[10] The court of appeals stated in passing that "it is doubtful that the police officer [who questioned respondent] had any authority to question [her] regarding her citizenship." Pet. App. 13a n.15. The statutes cited by the court, however, stand only for the propositions that a local law enforcement agency may enter into an agreement with the federal government to perform the functions of federal immigration officers, see 8 U.S.C. 1357(g), and that a local law enforcement agency must obtain confirmation from federal officials before detaining certain illegal aliens, see 8 U.S.C. 1252c(a). Those statutes, by their terms, do not foreclose a local police officer from merely *asking* about an individual's immigration status. To the contrary, one of those statutes allows local law enforcement officials "to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States," and "otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States." 8 U.S.C. 1357(g)(10).

The court of appeals also suggested that "[a]gents of the INS have limited authority to question and detain an individual suspected of being an illegal alien, so long as they have a particularized reasonable suspicion that the individual is in fact an illegal alien." Pet. App. 13a n.15. But the statutory provision on



constitute "seizures" for Fourth Amendment purposes "would have neither the text of the Constitution behind it nor any logical basis under it." *United States* v. *Childs*, 277 F.3d 947, 951 (7th Cir.) (en banc), cert. denied, 537 U.S. 829 (2002).[11]

### B. The Officers' Questioning Did Not Render Respondent's Detention Invalid

The court of appeals suggested that, even if the officers' questioning of respondent did not constitute a discrete Fourth Amendment event, the questioning, when considered together with the other factors discussed above, rendered respondent's detention invalid. Pet. App. 14a. That suggestion lacks merit. Where, as here, questioning of an occupant detained incident to a search warrant does not prolong the duration of the occupant's detention, the detention should be sustained.

1. Even a seizure that is reasonable at its inception may be conducted in such a manner as to violate the Fourth Amendment. The Court has acknowledged that a detention incident to execution of a search warrant

which the court relied, 8 U.S.C. 1357(a)(1), authorizes federal immigration officials to "interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States," and is more properly read to "confer[] upon the INS the authority to question aliens to the fullest extent permissible" under the Fourth Amendment. *Zepeda* v. *INS*, 753 F.2d 719, 725 (9th Cir. 1984).

[11] At one point, the court of appeals suggested that the officers also violated respondent's Fourth Amendment rights by searching her purse for her immigration papers. Pet. App. 14a. The jury, however, found only that respondent's seizure was unreasonable—not that respondent was the victim of an unreasonable search. *Id.* at 50a-51a. Even assuming that the search of respondent's purse was not consensual, respondent's immigration papers would appear to qualify as an "item[] of identification," and thus come within the ambit of the search warrant. J.A. 211.

will generally be "longer than the momentary" detention authorized when an officer has reasonable suspicion to believe that an individual is engaging in criminal activity. *Place*, 462 U.S. at 709; cf. *Summers*, 452 U.S. at 711 & n.3 (Stewart, J., dissenting) (noting that a detention incident to execution of a search warrant could last for several hours). Such a seizure, however, must be tied to its initial justification: the safe and efficient execution of the search warrant. Accordingly, officers cannot significantly prolong a detention authorized by *Summers* solely to conduct independent questioning of the detained individual. Indeed, the Court in *Summers* noted that officers would be unlikely to engage in detentions that are "unduly prolonged in order to gain more information, because the information the officers seek normally will be obtained through the search and not through the detention." 452 U.S. at 701.[12]

2. In this case, the officers' questioning of respondent did not extend the duration of her detention. The police officer who initially questioned respondent asked her only for her name, date of birth, and immigration status, and the INS agent who subsequently questioned her asked her only for her immigration papers. J.A. 106-107, 138-139; Pet. App. 25a-26a. That limited questioning took place while officers were diligently carrying out the search, and it was related (if indirectly) to the purpose of the underlying investigation. Respondent's brief and routine "interrogation"—"if it can even be called that," *Martinez-Camargo* v. *INS*, 282 F.3d

[12] Nothing would prevent officers, however, from conducting investigatory questioning of an individual even if it did prolong the *Summers* detention if the officers had reasonable suspicion focused on that individual or if the individual desired to cooperate.



487, 493 (7th Cir. 2002)—therefore did not even arguably call the validity of her detention into question. Respondent's questioning, and her underlying detention, were thus consistent with the Fourth Amendment.[13]

[13] To the extent that the court of appeals' holding that petitioners lacked qualified immunity on respondent's constitutional claims is properly before this Court, see p. 21, note 7, *supra*, the court of appeals also erred by holding that the right to be free from detentions involving questioning was clearly established at the time of the alleged violation. No court of appeals had addressed, and no other court of appeals has since addressed, the specific issue whether questioning renders a detention under *Summers* invalid. Although a number of courts of appeals, including the Ninth Circuit, have addressed the distinct issue whether questioning concerning unrelated subjects renders *traffic stops* unreasonable, those decisions, both before and after the conduct at issue here, have reached differing results. See, *e.g.*, *Childs*, 277 F.3d at 950-954 (upholding stop); *United States* v. *Shabazz*, 993 F.2d 431, 435-438 (5th Cir. 1993) (same); but see, *e.g.*, *United States* v. *Holt*, 264 F.3d 1215, 1228-1230 (10th Cir. 2001) (concluding that questioning on unrelated subjects can render stop unreasonable); *United States* v. *Ramos*, 42 F.3d 1160, 1163 (8th Cir. 1994) (same), cert. denied, 514 U.S. 1134 (1995); *United States* v. *Perez*, 37 F.3d 510, 513 (9th Cir. 1994) (same). Even if those decisions controlled the issue presented here, petitioners are entitled to qualified immunity on the basis that, "[i]f judges * * * disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson* v. *Layne*, 526 U.S. 603, 618 (1999).

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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